

- Nosocomial diseases
 - Occupational-related conditions (back problems, e.g.).
6. Hospital plans have these two characteristics:
- a. **Contain containment features which are largely ineffective**
An example would be an out-of-net copay of 70% but an in-network copay of 100%. In both encounters, either the provider or the participant can gain the economic edge.
 - b. **Do not contain cost containment features which are effective**
See companion treatise on Risk Management Considerations with Self-Funded Health Care Plans.
Address: www.ifebp.org/harker.



Stop-loss and Clerical Errors

Background

This critique reflects the common and industry practices of clerical errors with reinsurance and excess insurance each of which has a unique legal meaning and which should apply to stop-loss even stop-loss is not exactly the same as reinsurance or excess loss.

Basic Concepts

Both the common law and industry practices view stop-loss (i.e., reinsurance and/or excess loss insurance) as a mutually beneficial risk sharing arrangement between *consenting adults*. Such an *honorable* arrangement should be based upon (a) good faith, (b) fair dealing and (c) prompt and accurate communications. These honorable arrangements should (a) reflect industry customers and understanding, (b) be concerned with the perceived intentions of the parties and (c) treat the *jot and little* of contract provisions as secondary and not primary.

Historical Perspective

The genesis of these were the Lloyds contracts where the underwriters could divide up the risk by initializing the assumption percentage of the lateral risk. Errors in getting the *pot right* were common and were called *bordereaux*' errors. The clerical error was needed to achieve fairness and at the same time to see that a ship at sea could not lose coverage en route.

A definition of clerical error which have withstood the test of centuries is as follows:

- Clerical error is any error which:
 - Relates to information transmittal and/or communications
 - Is perfunctory or ministerial in nature
 - Involves claims processing, record keeping or underwriting functions
 - Is made by the Plan Sponsor, Plan Administrator, Plan Supervisor or any Party in interest to the Plan.
 - Does not involve errors of judgment or errors involving the knowledge of such error and its implication as an advantage to any party thereto
 - Does not, except for the error, expand or contract coverage.
 - Does not involve misconduct, misrepresentation, gross negligence, gross incompetence or poor administration as measured by industry standards
 - Is promptly reported and corrected.

(see page 24)

Court Cases

General Law

A clerical error may be one made in writing or copying,⁶ which often will be evident on the face of document;⁷ such error may be in matters of records or record-keeping⁸; such errors are generally those made by ministerial or staff persons, clerks or printers and not the result of judgment or discretion.⁹

Instances of a clerical error include the following

- Failure of a court clerk to enter an order.¹⁰
- Omission in a plan document of a statutory provision.¹¹
- Setting of a limitation before a legal limit.¹²
- Inclusion of needless or extraneous material in the document.¹³

- Misstatement of statutory, judicial or regulatory intent.¹⁴

The Federal rules provide that a court may, on its own initiative, or by a motion of any party to a dispute correct a clerical error.¹⁵

Reinsurance or Excess Court Cases

In General

A brief review of a few of the court cases which involve clerical errors with either reinsurance or excess loss follows.

Agent's Erroneous Action

The agent made a clerical error but such was committed while acting outside his authority. This was held to not be a clerical error.¹⁶

Error in Application

Insurer's attempt to avoid liability decrease a certain box on the application was erroneously not checked was blocked by the court. The omission of an "X" was patently a clerical oversight with no impact on the assumed risk.¹⁷

Recoupment of a Claim

Claims paid by virtue of a mistake of fact which was not induced by fraud or clerical error may not be recouped.¹⁸

Broadened Definition of Clerical Error

The court held that clerical error was not

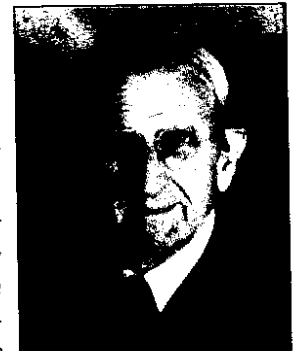
limited to clerical or ministerial errors but extended to administrative-type errors (beyond those of records and communications).¹⁹

End Notes

1. Reinsurance must have an insurance company in both ceder and assumer; excess insurance is not written on a reimbursement basis; stop-loss fails by rigorous tests on being either reinsurance or excess but it is extremely close to both.
2. The bordereaux stems from the fact that the initials were made on the edges (or borders) of the agreement.
3. Rev. Proc. 98-33 and Rev. Proc. 99-13.
4. *Engineered Timber Sales Inc. v. Commissioner*, 74 T.C. 808 (1980).
5. *In re Estate of Duncan*, 232 A.2d 717 (Pa. 1967); *Jonas v. Meyers*, 101 N.E. 2d 599 (Ill. 1951); *Maland v. Houston Fire & Casualty Insurance Company*, 274 F.2d 756 (8th Cir. 1926); *Snipes Mountain Company v. Benz Brothers & Co.*, 298 P. 74 (Wash. 1931); *Wilson v. Moog Automotive, Inc.*, 193 F.3d 1004 (8th Cir. 1999); *Jensen v. SIPCO*, 38 F.3d 945 (8th Cir. 1994), cert. Denied, 415 U.S. 1050 (1995); *International Union of Electronic Workers v. Murata Erie North America*, 980 F.2d 889 (Cir. 1992); *Matthews v. Sears Pension Plan*, 144 F.3d 461 (7th Cir.), cert. Denied, 525 U.S. 1054 (1998); *Audio*

Fidelity Corporation v. PBGC, 624 F.2d 513 (4th Cir. 1980); *Cinelli v. Security Pacific Corporation*, 611 F.3d 437 (9th Cir. 1994); *Aramony v. United Way Replacement Benefit Benefit Plan*, 191 F.2d 140 (2nd Cir. 1999); *Airline Pilots Association v. Shuttle, Inc.*, 555 F.Supp. 2d 47 (D.D.C. 1999); *Landro v. Glendinning Motorways, Inc.*, 625 F.2d 1344 (8th Cir. 1980).

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